

**Arizona Department of
Economic Security**



Appeals Board

Appeals Board No. T-1038691-001-B

In the Matter of:

X EA, UI TAX SECTION
C/O ROBERT J DUNN CFP/CLA
ASSISTANT ATTORNEY GENERAL
1275 W WASHINGTON ST O40A
PHOENIX, AZ 85007-2926

Employer

Department

DECISION
AFFIRMED

THE **EMPLOYER** petitions for a hearing from a Decision of the Department issued May, 15, 2006, which held that the Determination of Unemployment Insurance Liability, issued August 2, 2005, finding the Employer was a successor to part of a business of a liable employer, is final and binding because the request for reconsideration was not filed within the statutory period.

The Employer filed a timely petition for a hearing from the Department's Decision and the Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-672(D), 23-733, and 23-724(A).

At the direction of the Appeals Board, a hearing was held on July 13, 2007, in Phoenix, Arizona, before William E. Good, Administrative Law Judge, for the purpose of considering the following issue, of which all parties were properly noticed:

Whether the is Employer's request for reconsideration of the determination of Unemployment Insurance liability dated August 2, 2005, was timely filed.

The following persons were present at the hearing:

KATHERINE WHALEY	Department witness
ROBERT DUNN	Department counsel
X	Employer

At the hearing, the witnesses were sworn and testified. Board Exhibits No. 1 through 56 were admitted into the record as evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. A Determination of Unemployment Insurance Liability was sent by certified mail on August 2, 2005, to the Employer's last known address of record. The Determination informed the Employer that it was successor to part of a business of a liable employer. The Determination also advised the Employer that the Determination would become final unless written request for reconsideration was filed within fifteen days of the date of the Determination (Tr. pp. 13, 14, 17; Bd. Exh. 12). To be timely, a request for a reconsidered determination had to be filed by August 17, 2005.
2. By letter postmarked September 10, 2005, the Employer filed a request for reconsideration (Tr. pp. 14-16; Bd. Exhs. 16, 17).
3. On May 15, 2006, the Department issued a decision advising the Employer that the Determination of Unemployment Insurance Liability, issued August 2, 2005, finding the Employer was a successor to a part of the business of a liable employer, was final and binding because the request for reconsideration was not filed within the statutory period (Bd. Exh. 43).
4. By letter postmarked May, 30, 2006, the Employer filed a petition for a hearing or review of the Department decision (Bd. Exhs. 44, 45).

Arizona Revised Statutes § 23-724(A) provides:

- A. When the department makes a determination, which determination shall be made either on the motion of the department or upon application of an employing unit, that an employing unit constitutes an employer as defined in § 23-613 or that services performed for or in connection with the business of an employing unit constitute employment as defined in § 23-615 which is not exempt under § 23-617 or that remuneration for services constitutes wages as defined in § 23-622, the determination shall become final with respect to the employing unit fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within such time the employing unit files a written request for reconsideration (emphasis added).

In this case, the Employer had until August 17, 2005, to file a timely request for a reconsidered determination of the August 2, 2005 Determination of Unemployment Insurance Liability. The Employer did not file such a request until September 10, 2005.

Arizona Revised Statutes § 23-724(A), made applicable by Arizona Administrative Code, Section R6-3-1713(C) is unambiguous, declaring that the determination "... shall become final" In the absence of a timely request for reconsideration, the Appeals Board is without authority to interpret the statute other than according to its terms.

The Arizona Court of Appeals has addressed the issue of timeliness of appeal from a prior determination, and has taken the position that the statutory prerequisites must be observed if an appeal is to be considered timely.

In Wallis v. Arizona Department of Economic Security, 126 Ariz. 582, 617 P. 2d 534 (Ariz. App. 1980) the court, interpreting A.R.S. § 23-773(B) held that a determination issued by a claims deputy becomes "final" unless there is a timely appeal to that determination. The court stated:

We must assume that the legislature meant what it said, and therefore hold that where the statutory prerequisites for finality to a deputy's determination are established, that decision becomes "final", unless a timely appeal is perfected.

In Banta v. Arizona Department of Economic Security, 130 Ariz. 472, 636 P.2d 1254 (Ariz. App. 1981) the court was confronted with virtually the identical issue before us in this case, i.e., an untimely request for reconsideration under A.R.S. § 23-724(A). In that decision the court said:

... We therefore hold that a liability determination becomes final fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within this time the unit files a written request for reconsideration.

Arizona Administrative Code, Section R6-3-1404 provides in pertinent part:

A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:

1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion (emphasis added).

* * *

B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

* * *

4. If submission is not considered timely ... the Department shall issue an appealable decision to the interested party. The decision shall contain the reasons therefor, a statement that the party has the right to appeal the decision, and the period and manner in which such appeal must be filed under the provisions of the Arizona Employment Security Law (emphasis added).

C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to addressee's last known address if not served in person. However, when it is established the interested party changed his mailing address at a time when there would have been no reason to notify the department, it shall be considered as having been served on the addressee on the date it is personally delivered or remailed to his current mailing address. The date mailed shall be presumed to be the date of the document, unless otherwise indicated by the facts (emphasis added).

Here, the Employer has asserted no reason for the late filing of the request for reconsideration which, if accepted as true, would establish a condition which would cause the Board to consider the request timely.

The court in Banta, supra, also addressed the application of Arizona Administrative Code, Section R6-3-1404(B), stating:

The appellants have not established that their untimely request for reconsideration was the result of post office delay or other action. Their untimeliness, consequently, was inexcusable.

The evidence establishes that no request for reconsideration of the Determination issued August 2, 2005, was filed within the time prescribed by A.R.S. § 23-724(A). The Employer's letter postmarked September 10, 2005, was beyond the appeal period. A request for reconsideration filed outside the statutory period may be considered timely only if the late filing is due to Department error or misinformation, postal error, or a change of address when there is no reason to notify the Department of the change.

Based upon the evidence before us, the Board concludes that the Employer failed to file a timely request for reconsideration of the Determination of Unemployment Insurance Liability issued August 2, 2005, and is not entitled to a hearing on the merit issues in this matter. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Decision of May 15, 2006.

The Determination of Unemployment Insurance Liability, issued August 2, 2005, is final and binding on the Employer.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
 2. Parties may be represented in the following manner:

An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
 3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.
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A copy of the foregoing was mailed on
to:

(x) Er: X

Acct. No: X

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(x) JOHN NORRIS, CHIEF OF TAX
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By: _____
For The Appeals Board